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JAMES H. MCKENNEY.

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the Supreme Court of the United States.

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THE MOBILE TRANSPORTATION COMPANY,
Plaintiff in Error,

against

THE CITY OF MOBILE, A MUNICIPAL CORPORATION,
Defendant in Error.

ON BEHALF OF THE PLAINTIFF IN ERROR, IN
PPOSITION TO THE MOTION OF DEFENDANT IN
RROR TO DISMISS OR CONFIRM THE JUDGMENT
F THE SUPREME COURT OF ALABAMA HERETO-
ORE ENTERED HEREIN.

FREDERICK G. BROMBERG,
Attorney for Plaintiff in Error.

AM B. PUTNEY,
Of Counsel.

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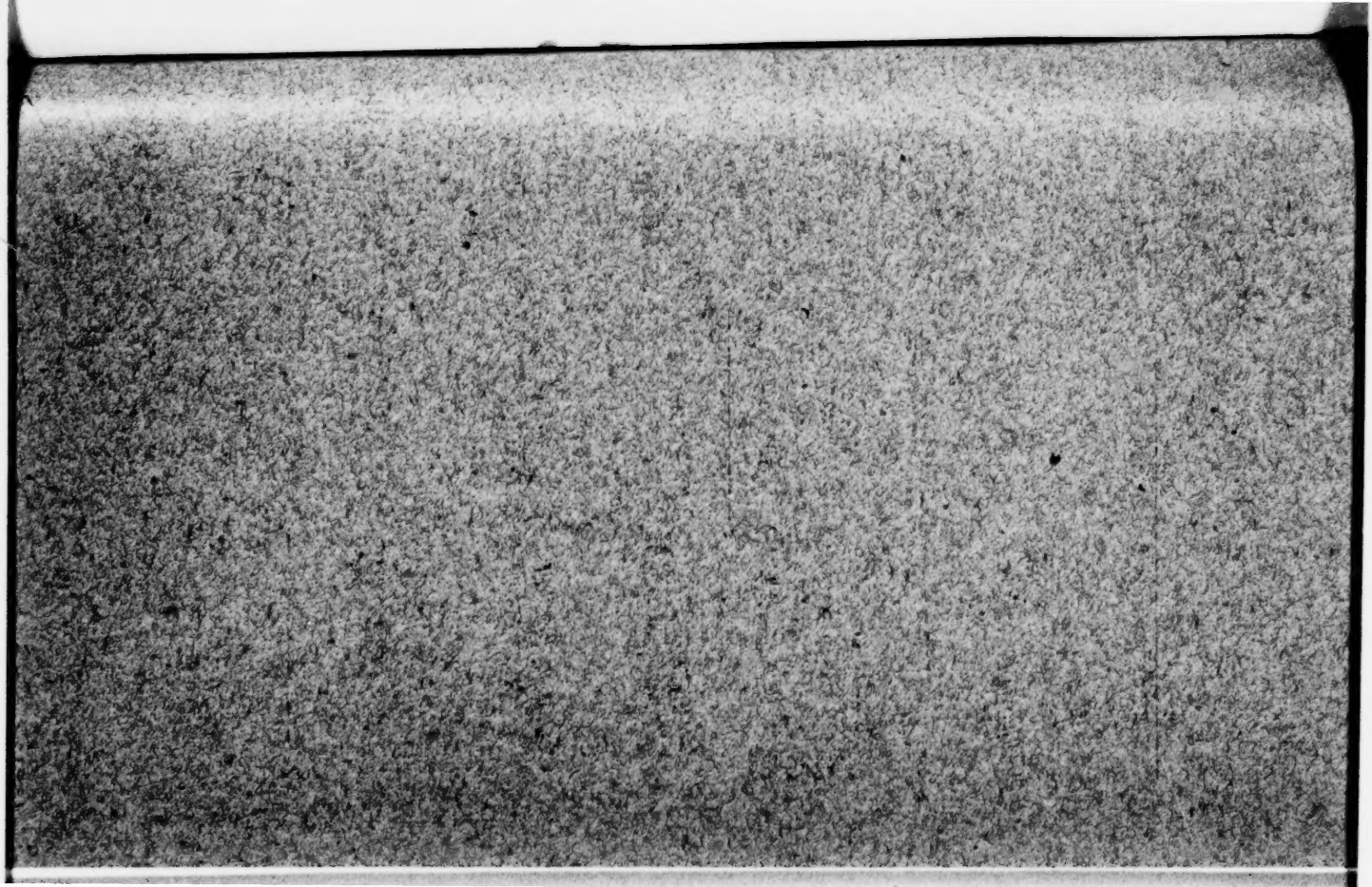

IN THE

Supreme Court of the United States.

THE MOBILE TRANSPORTATION COMPANY,
Plaintiff in Error,

AGAINST

THE CITY OF MOBILE, a Municipal Corporation,
Defendant in Error.

BRIEF ON BEHALF OF THE PLAINTIFF IN ERROR, IN OPPOSITION TO THE MOTION OF DEFENDANT IN ERROR TO DISMISS OR CONFIRM THE JUDGMENT OF THE SUPREME COURT OF ALABAMA HERETOFORE ENTERED HEREIN.

This was an action of ejectment, brought to recover certain lands, referred to in the complaint, and the possession thereof, being lands on the Mobile River and assumed to be in the City of Mobile.

The plaintiff below claimed to recover by virtue of its alleged ownership of the lands in question, under certain acts of the Legislature of the State of Alabama, passed in 1867 and 1896, whereby the State assumed to grant to the City of Mobile the shore and the soil under the Mobile River. It claimed that said lands were within the boundaries of the

State of Alabama, when it was admitted into the Union, in December, 1819, and that the title to all lands, including those in question which were in the United States, within the territory embraced in the State of Alabama, became vested in that State, upon its admission into the Union.

The defendant below and the plaintiff in error, upon the trial in the trial Court, offered evidence to prove that it owned the lands in question in fee simple; that the title of their grantors or assignors was derived from a Spanish grant, made to Joseph Gaspar Munora, in March, 1792. Evidence was also offered to show the occupation by Bernoudy, the grantee of Munora, and the habitation and cultivation of the lands by him, at least as early as 1809. Evidence was also offered to show a chain of record title from the said Bernoudy, without a break, into the plaintiff in error. The evidence offered, therefore, showed, or tended to show, that the real ownership of the lands in question was in the assignees or successors of Bernoudy, at the time when the State of Alabama was admitted into the Union.

Alabama became a State, by resolution of Congress, December 14, 1819. A treaty was made between the United States and Spain on February 22, 1819, which contained the following provision:

"All the grants of lands made before the 24th day "of January, 1818, by his Catholic Majesty or his "lawful authorities, in said territories ceded by his "Majesty to the United States, shall be ratified and "confirmed to the persons in the possession of the "lands, to the same extent that the same grants "would be valid if the territory had remained under "the dominion of his Catholic Majesty."

The evidence offered on the part of the plaintiff in error shows that the claim of Regis Bernoudy to these lands, founded on the conveyance made to him by Joseph Gaspar Munora, was presented to the Land Commissioners of the

United States; that, after examination, they reported that the claim of Bernoudy should be confirmed.

These Land Commissioners were appointed by the Act of Congress of the 25th day of April, 1812, and their report was confirmed under the Act of March 3, 1819, and finally adjusted by the Act of Congress of May 8, 1822. These proceedings constituted a recognition of Bernoudy's title derived through the grant of the Spanish Government, and also in accordance with the provisions of the Treaty of 1819.

It is contended by the plaintiff in error that the title to these lands was in Bernoudy, or his assignees, prior to and at the time that Alabama became a State, and that the United States Government, at that time, did not have the ownership of these lands, and it could not pass from the United States to the State of Alabama. Subsequent to this, in 1836, a formal patent was issued by the United States, signed by Andrew Jackson, President, by his secretary, which patent recites the material facts on which Regis Bernoudy's title was established, including the Acts of 1819 and 1822, aforesaid. This was merely a recognition and confirmation of the title of the property in question, originally granted in 1792 by the Spanish Government, and preserved by actual occupation and use and by the Treaty of 1819.

In Pollard's Heirs *v.* Kibbe, 14 Peters, 353, it was held that claims granted by the Spanish authorities, though the titles may have been incomplete, came under the examination of the Commissioners appointed by the Act of Congress of the 25th day of April, 1812, and were not beyond the power of Congress to confirm, though such confirmation was subsequent to the admission of the State of Alabama into the Union.

The case further held (p. 383) that the Acts of 1819 and 1822, being founded on the reports of the Commissioners, made in 1816 and 1820, must be taken with reference thereto and as recognizing the claims

therein reported as valid, to be complete titles, by their intrinsic effect.

The plaintiff in error, therefore, claims that the title of Bernoudy, by the proceedings aforesaid, is beyond dispute. The questions with reference thereto, calling in question these Acts of Congress, the Treaty with Spain and the patent of the United States, are Federal questions, and there is absolutely no doubt but what this Court has jurisdiction (Mobile *v.* Eslava, 16 Peters, 234; Mobile *v.* Hallett, 16 Peters, 261).

The plaintiff in error, therefore, makes, as a preliminary point, that the defendant in error shows no color of right to a dismissal, and that, therefore, under a well established rule the motion to affirm should not be entertained (Davies *v.* Corbin, 113 U. S., p. 687).

The defendant in error contends that the law is so thoroughly established, in this Court, that this appeal must be classed as frivolous, and therefore the Court may affirm the judgment of the Court of Alabama; but, in all our examination of the cases, in which similar questions have arisen, we have not found any cases where the title originated by grants made prior to the treaty of St. Ildefonso, of October 1, 1800; consequently, the present case is different, in that respect, from Pollard *v.* Hagan, 3 How., 212, and the other cases cited on page 11 of the brief of the defendant in error.

The case at bar, therefore, depends upon facts not heretofore passed upon by this Court, but which, under the reasoning of this Court in the cases already cited, would confirm the title of the plaintiff in error, as we think.

In addition to what has been said, the following will give a further idea of the questions involved in this case, and it must appear that the questions presented are such as this Court has jurisdiction over, and that they are serious and important questions which cannot be disposed of on a plea that

this is a frivolous appeal, but that there should be opportunity to argue it on the merits.

(For the facts herein referred to, see Certificate of the Chief Justice of the Supreme Court of Alabama, which is a part of the record, no printed case having been made by the moving party to which we can refer, at the time of writing this memorandum.)

Counsel for the defendant in error in his statement of the case, in his brief, states the nature of the action, and the special law under which the alleged title of the City of Mobile is derived from the State. He alleges that by the Act of Alabama, approved January 31, 1867, and set out at length on page 2 of his brief, the shore and soil under Mobile River was granted to the City of Mobile; and the complaint, shown in the record, alleges that plaintiff in error unlawfully entered into possession of a lot of land extending along the channel of Mobile River, some seven hundred and thirty feet, and shoreward into a tract of land, which is called in the complaint "the Bernoudy Tract," four hundred feet. Said counsel fails, however, to state that the record shows that there was absolutely no evidence whatsoever introduced at the trial of the cause, showing whereabouts along the city's front, as defined in said Act of 1867, were these lands; absolutely no evidence whatsoever that any part of the described land was "under Mobile River"; absolutely no evidence whatsoever that the high water mark on the land sued for was eleven hundred and fifty-six feet east of Water street; absolutely no evidence whatsoever that there is any regular tide in Mobile River, at the point in controversy, due to the attraction of the sun and moon; and absolutely no evidence whatsoever as to the whereabouts the Bernoudy Tract is located along Mobile River.

Counsel also neglects to state that all evidence offered by the plaintiff in error to show that the lands in its possession were held by it in fee simple under mesne conveyances from the assignees of the grantee of a Spanish grant made in 1792 by the

Spanish authorities, was excluded; that all offers of evidence that plaintiff in error and those under whom it claimed had occupied these lands openly, notoriously, adversely and continuously, under a claim of right, more than twenty years before the bringing of the suit by the defendant in error, were excluded; that all offers of proof of the valuable improvements made by plaintiff in error upon said lands, more than three years before the bringing of the suit, had been wholly excluded.

It is this state of the record which gives rise to the Federal questions certified to by the Chief Justice of Alabama, as presented by it in this cause, and which are additional to the three Federal questions admitted by the defendant in error, in his brief, to exist in this case, and which involve the questions of the violation of Section 10, Article 1, and of the 14th Amendment to the Constitution of the United States. Counsel for the movant in this case distinctly admits in his brief, on pages 4 and 5, that there are three Federal questions, at least, involved in this appeal, viz.: 1. Whether the State of Alabama obtained a title to the shore and soil under the Mobile River by virtue of the compact under which Alabama became a part of the Union. 2. As to the effect of the patent from the United States, offered in evidence in this case, but excluded by the trial Court, and which exclusion was sustained by the Supreme Court of Alabama. 3. Whether the Act of the General Assembly of Alabama, approved January 31, 1867, as construed by the Supreme Court of Alabama, is or not an interference with commerce.

In this statement, the movant's counsel ignores the other Federal questions distinctly raised by the record, hereinbefore set out, and as shown by the certificate of Chief Justice McClellan of Alabama, viz.: The violation of the provisions of Section 10, Article 1, of the Constitution of the United States; and, also, the violation of the 14th amendment to said Constitution.

It seems, therefore, to plaintiff in error, that, upon this admission of counsel made in his brief, and because of his ignoring absolutely the other Federal questions shown by the record, and certified to by the Chief Justice of Alabama, this motion should be denied upon the authority of Blythe *v.* Hinckley, decided by this Court February 25, 1901, 180 U. S., p. 333.

Inspection of the record in this case shows, also, that the writ of error was not sued out for delay or for a frivolous cause. Nothing less than the title to the entire shore front of Mobile River, on both sides, for a length of about six miles, including the river front of the present City of Mobile, is involved in this case.

Such inspection will show that plaintiff in error was deprived by the judgment of the Supreme Court of Alabama of a body of land bordering upon Mobile River, more than two and a half acres in length, in front, with a depth of nearly two acres, without a scintilla of evidence introduced at the trial on behalf of the defendant in error, showing that this land sued for was actually under the navigable waters of Mobile River. Such inspection will also show that no evidence was allowed to be introduced by the plaintiff in error at such trial, and that all the evidence of plaintiff in error was excluded upon objection by the defendant in error.

The pertinency of this remark is evident when it is recalled that Spanish grants lying within the limits of the City of Mobile may go to the channel of Mobile River, and have so been held to extend.

Hagan *v.* Campbell, 8 Porter, 9.
Hallett *v.* Hunt, 7 Ala., 905.

The patent and field notes in this case showed that the original Spanish grant, offered in evidence, was bounded by the river, and yet they were excluded as immaterial and irrelevant by the trial

Court, and the Supreme Court of Alabama affirmed that action of the trial Court.

It is settled law in Alabama that the Spanish crown had complete property in Alabama in tide waters, and could vest such rights in a grantee.

Mobile *v.* Eslava, 9 Porter, 592–595.

It was said in Innerarity *v.* Mims, 1 Ala., 660, decided in 1840: "Where possession of land was acquired, within the limits of the territory claimed by the United States, by virtue of the treaties of St. Ildefonso and Paris, whilst Spain exercised *actual* dominion over it, under the defense of the Statute of Limitations, the possession of land will be dated from the period of its actual occurrence, and not from the date of the Act of Congress of 1812, abrogating the Spanish, and extending the laws of the Mississippi territory over the country, nor from the date of the actual occupation of the territory by the United States, the succeeding year."

This case is cited in Eslava *v.* Farmer, 7 Ala., 555, decided in 1845. It was also said in the latter case (Eslava *v.* Farmer) that it is "quite unimportant whether the title of the United States rests upon the cession made by the Treaty of Paris, or by that made with Spain in 1819, by which the Floridas were acquired, as in both this Government came under the same obligations to respect the rights of private property. Such would have been the law if the treaty had contained no such provisions or if the country had been acquired by conquest (Perchieman's case, 7 Peters, 51; Strother *v.* Lucas, 12 Peters, 438, and Innerrarity *v.* Byrne, 1 Ala. Rep., 672)."

It was clearly competent for Spain, whilst it continued in possession of this country, to make the grant offered in evidence in this case.

Hallett *v.* Hunt, 7 Ala., 882, 897–899.

Pollard *v.* Files, 2 How., 991.

The evidence offered by the plaintiff in error, but excluded by the Court below, showed that Regis Bernoudy claimed the land under a Spanish grant or concession made March 3, 1792, or when the country was unquestionably in the possession of Spain, and, therefore, within the provisions of the Treaty of 1819, according to the authorities hereinbefore cited.

Under the act approved December 4, 1812, Laws of Alabama (Toulmin's Digest), page 248, entitled "An Act making further regulations in judicial proceedings," it was provided, "That all certificates issued in pursuance of any act of Congress, by any of the boards of commissioners, register of a land office, or any other person duly authorized to issue such certificate upon any warrant, or order of survey, or to any donation or pre-emption claimants, for any lands in this territory, shall be taken and received as vesting a full, complete and legal title in the person in whose favor the said certificate is granted, to the lands therein mentioned, and his, her or their assigns so far as to enable the holder of such certificate to maintain any action thereon, and the same shall be received in evidence as such in any court of this territory." This act is cited in the opinion in the case of Hallett *v.* Eslava, 2 Stew., 118; and Hallett *v.* Eslava, 3 Stew. & Port., 126.

Riparian Rights.

It was said in Miller *v.* Cullum, 4 Alabama, 582, decided in 1843: "But suppose the Spanish concession *in totidem verbis* had recognized the mouth of the branch, as the northeast corner of the tract at the time it was surveyed, would it not be admissible to show, that owing to alluvial deposits and other causes, the locality had been changed, so as by an adherence to it, greatly to increase or diminish the quantity which passed by the grant, or to change the form of the plot?"

In Hagan *v.* Campbell, 8 Porter, 33, it is said: "Nor can the fact of a road running along the bank of a navigable river, be held to limit a grant having the river for its boundary, so as to exclude its proprietor from riparian rights; and in this case there cannot be the slightest pretense for such an idea. The freehold in the land over which the road runs, did not continue in the Spanish Government; that was transferred by the grant, while its use only was to be enjoyed by the public (Cortelyou *vs.* Van Brundt, 2 Johns. R., 351). And the title to all the soil lying between the original tract and the river, having passed by virtue of the grant of 1807, to John Forbes & Co., and of course to his assignees, they immediately became entitled to the right to alluvial formations, in the same manner as other riparian proprietors are, on navigable streams.

But even supposing that the Spanish grant only conveyed the title, to what was known as high-water mark, at the time it was made, the plaintiffs then would have been entitled, as riparian proprietors, to every increase of land by alluvion."

This doctrine is reaffirmed in Hallett *v.* Hunt, 7 Ala., 882.

In Hagan *v.* Campbell, 8 Porter, 9, it is said that "Riparian proprietors are entitled to all accessions made, to the lands granted, either by the retreating of the river from its former limits; or by the slow and secret deposit of sand, or other substances."

"Where the term 'river' is used in a grant, as a boundary—high or low water mark must be intended—not a middle point."

"A plat or plan of survey may be referred to in a grant, and become part of it, showing the proper lines, and ascertaining the locality."

In this case, the grant referred to was dated at Pensacola, the 25th day of September, 1807, and was made by the intendant of the province of West Florida; and that in 1774 Pantan, Leslie & Co. purchased of William Richardson the tract embraced by the British grant, and John Forbes, a partner of

said firm, by his memorial to the tribunal of the intendancy of West Florida, asked a confirmation of his title. The grant, after reciting the reference of the memorial and its accompanying documents, to the appropriate officers of the Spanish Government, and their action thereon, made a declaration shown on page 14 of said report.

Referring to this Spanish grant the Supreme Court of Alabama say: "Here is a clear grant of all the soil lying between the tract first granted and the river, designated upon the plat or plan of survey accompanying the Spanish grant. Where the term 'river' is used as a boundary, either high or low-water mark must always be intended, and not some middle point. The land embraced by the British grant is 'terminated by the bank of said river (Mobile) on the east side'; by the 'east side,' we are to understand the eastern boundary of the tract, and not the eastern margin of the river. It is, then, clear beyond controversy, that the grant of 1767, extended to the river, which, as already shown, was high-water mark" (p. 28).

These rulings of the Supreme Court of Alabama are certainly ancient enough to have created a right of property which will be respected, and the right obtained thereunder protected, by this Court, even if the Supreme Court of Alabama afterwards should appear to intimate to the contrary, as was done in this case, wherein the Court sustained the refusal to give the charge requested by the plaintiff in error, limiting the recovery of the defendant in error to such shore and soil as was under the waters of the river in 1897, the time of the bringing of the suit. The Supreme Court of Alabama sustained the refusal to give this charge on the ground that the defendant in error is entitled to all the lands extending back to high water, if such there was, in 1867, the date of the act under which defendant in error claims, and this without regard as to whether or not

there were any secretions and alluvion made, changing that line, since 1867.

Morgan *v.* Curtinius, 20 How., 1.
Wade *v.* Travis Co., 174 U. S., 499.

This right to alluvion is a vested right, of which the plaintiff in error cannot be deprived without compensation. A right vested is a contract executed, and a statute impairing a vested right impairs the obligation of a contract.

New Jersey *v.* Wilson, 8 Cranch, 164;
6 Cranch, 131.

The rights of riparian owners in Mobile to the wharves in front of their lands abutting on the river is clearly recognized in Boulo *v.* New Orleans, Mobile & Texas Railroad Co., 55 Ala , 480, wherein the opinion was delivered by Chief Justice Brickell, who says: "The place in controversy is a slip between two wharves, the one on the north known as 'Church Street Wharf'; the one on the south as 'Hogan's Wharf'; its western boundary is Commerce street, from which it is separated by a bulkhead or barrier; and on the east it extends into the Mobile River. Whether the whole slip is not, at high tide, covered by the water of the river, is a fact about which the evidence conflicts. We incline to the opinion that, immediately at the barrier, or bulkhead, land has been formed, which is not usually covered by water at high tide. Originally, Commerce street, at this place, was covered by high tides, if not at all times; and the water extended to, if not beyond, the storehouse of the complainants, on the western side of the street. The municipal authorities of the City of Mobile gradually reclaimed the land now forming the street, and the labor of proprietors, asserting riparian rights, and exercising them in the constructions of wharves into the river, on the east side of the street, contributed."

In the case of Kennedy *v.* Bebee, 8 Ala., 909, the defendants were in possession of a lot, part of Fort

Charlotte. The statement of the case, as reported by the Judges themselves, shows that "the line of the fort lots were extended east, below high water mark, but since their sale Water street has been laid off east of them, and the land reclaimed by art; and between this street and the channel of the river, and *in front of the lot of which the defendants are proprietors, the land in controversy is located.*"

"The plaintiff prayed the Court to charge the jury, 1. That he was entitled to all the land lying between the eastern survey of Dinsmoor and the river, according to the evidence adduced. 2. That he was entitled to the land embraced by the patent from the United States to his lessor, which was not contained in the grant to the lot company, and *that the limits of these lots could not be extended by improvements made by riparian proprietors.*"

"These several prayers for instructions were denied, and the Court charged the jury that the case of Abbot's Exr. *v.* Doe *ex dem.* Kennedy, 5 Ala. Rep., 393, was a decisive authority against the plaintiff's right to recover. A verdict was returned for the defendants, and judgment rendered accordingly."

The statement by the Judges further shows that "It was conceded that if the Fort Charlotte lots had been bounded by the river, that the defendants would have had riparian rights, and their counsel insisted that an extension of their lines below high-water mark could not make a different rule of law applicable."

The judgment of the Circuit Court was affirmed.

Abbot *v.* Kennedy, 5 Ala., 393, is another Mobile case distinctly recognizing the riparian rights of owners of land on Mobile River in the City of Mobile.

The statement of the case by the Judges shows that "he (defendant) called many witnesses, who testified that at the time of the sale of the Fort Charlotte lots high water extended over the eastern

limits of the lots conveyed by the defendant's patents; *and further*, that the land now in controversy was reclaimed from the water and *filled up by the defendant's testator, or those under whom he mediately or immediately claimed.* The defendant deduced a title to himself to the lots described by the patents, and proved that the property in controversy was adjoining them, and *lay immediately east of them.* The Court charged the jury that if they believed the evidence, the plaintiff's title was the best."

The judgment of the Circuit Court in this case was reversed.

In this case Chief Justice Collier says, page 395: "It is a well settled principle of the common law that a person whose land is bounded by a stream of water which changes its course gradually by alluvial formations, shall still hold by the same boundary, including the accumulated soil (New Orleans *v.* The United States, 10 Peters Rep., 717; Hagan & Campbell *v.* Cleaveland, 8 Porter's Rep., 9, and cases there cited). *Angell*, in his treatise on Tide Waters, argues to prove that it is allowable to make embankments on, or reclaim the shore, and appropriate it to private purposes where the public are not incommoded. But admits that the common, which is founded on the civil law, recognizes the State as the legal proprietor of the shore, in trust for the public, and entitled to judge whether artificial improvements will be promotive of the common right of enjoyment; and consequently may abate an intrusion as a public nuisance, or a purpresture (pp. 125, 133, 143). The inference from the law, as we have stated it, is that accretions from natural causes become the soil of the riparian proprietor, that his limits extend, or diminish, according as the water may recede or trench upon his land. The State only claims a property in the shore, as the representative of the public, for purposes entirely conservative of the usufruct therein, and never destructive of it. This be-

ing the case, it would seem necessarily to follow that the sovereign power can make no disposition of the shore, by grant or otherwise, prejudicial to the rights of those for whom it is holden in trust. This question was considered quite at length in The Mayor, &c., of Mobile *v.* Eslava (9 Porter's Rep., 577), in which it was held that, although it was competent for the King of Spain, in the exercise of his unlimited powers, to grant the shore of the navigable waters in his American possessions, yet Congress was prevented by the stipulations with Alabama from exercising such a power since its admission into the Union."

* * * * * *

"From what we have already said it results that no subsequent grant by the government can operate to divest the defendant's right to alluvion, or change his boundary by interposing another proprietor of the soil between his land and the water. The terms of the act cited forbid the idea that such an interference was contemplated" (p. 396).

In Pollard *v.* Greit, 8 Ala., 930, the statement of the case, page 933, shows that the defendant's land was made by Tankersly's filling up the marsh in 1822, between Water street and the river, at Government street, in the City of Mobile, and Tankersly's title was sustained in this case.

In Chastang *v.* Dill, 19 Ala., 421, the statement of the case shows that the plaintiffs claimed a lot of land lying between Royal street and Mobile River, and that "There was a conflict in the testimony as to the extent of the lot, some witnesses testifying that it extended to the river, and was partially covered by the water at high tides, whilst others testified that it was subject only to be reached by the water at extraordinary high tides, and that between the lot and the river, there was a low flat waste, usually wet, and some places covered with stagnant water, but elevated above ordinary high-water mark. The witnesses agreed that John Chastang had enclosed the lot with a picket fence, and

that the fence extended as far the lot could be cultivated, but that the fence did not extend to ordinary high-water mark, and most of the witnesses said that the lot sued for was not within the lines of said picket fence. It was admitted that the lot sued for was within the limits of the claim as presented to the commissioners by Barzella Chastang, and also within the limits of that claim as laid down in the official survey, the form of which is given by an exhibit to the bill of exceptions."

The verdict was for the defendant, but upon appeal this judgment was reversed.

This case shows clearly that the lot sued for was east of the fence, that the fence went as far as the low ground, and that, therefore, this lot was in lines which were either under the high tide, or was a low, flat waste, usually wet, and in some places covered with stagnant water, and the right of the plaintiff thereto was sustained.

This case shows, also, very clearly, that a very large part of the most valuable business portions of the City of Mobile is built upon lands reclaimed from the river of Mobile by private individuals, and which, according to the decision in the case at bar, are upon State lands, and the owners are liable to be ejected whenever the State chooses to convey the same by appropriate words to the City of Mobile.

In Howard *v.* Ingersoll, 17 Ala., 792, decided in 1850, it was said by Chief Justice Dargan, that "A grant, therefore, that is bounded by the shore of a fresh water river, conveys the land to the water's edge at low water."

The Mobile River is a fresh water river at the City of Mobile.

Toumey in his geology of Alabama, says (2d Biennial Report, pp. 151, 122), speaking of Mobile Bay: "The great volume of fresh water flowing into the Bay and the *very narrow* entrance, prevent the water from becoming even brackish at Mobile till late in the season, when the rivers become low."

Even supposing the Act of January 31, 1867, conveyed to the City the shore and soil under the waters of Mobile River, yet such a grant does not vest it with exclusive riparian rights, so that it has the right to oust the plaintiff in error from its riparian rights as owner of land abutting on Mobile River.

Turner *v.* The People's Ferry Co., 21 Fed. Rep., 90.

The Alabama decisions upon this subject are in harmony with those of the United States Supreme Court.

Jefferson *v.* Omaha Land Co., 134 U. S., 189.
Nebraska *v.* Iowa, 143 U. S., 359.
Shively *v.* Bowlby, 152 U. S., 35.

Statute of Limitations.

The Statute of Limitations in favor of plaintiff in error against the State began to run upon the adoption of the statute of twenty years, which was with the adoption of the Code of Alabama of 1852, about fifteen years prior to the Act of 1867; and it was not in the power of the State to deprive the plaintiff in error of the rights vested in it by virtue of such possession.

In this State it was held, as far back as in the case of Grice *v.* Jones, 1 Stewart, 254, "That when the Statute of Limitations begins to run, it continues to run notwithstanding any intervening disability to sue."

"But even supposing that the Spanish grant only conveyed the title, to what was known as high-water mark, at the time it was made, the plaintiffs then would have been entitled, as riparian proprietors, to every increase of land by alluvion."

Hagan *v.* Campbell, 8 Porter, 33.

Enough has been said to show that this appeal is not frivolous, nor taken for the purpose of delay.

That the property of this plaintiff in error has been in its possession, or of its grantors, for over one hundred years, certainly entitles the plaintiff in error to ask the careful consideration of this Court to a full argument on the merits; and the serious questions herein presented ought not to be decided upon a mere motion to dismiss, especially where the jurisdiction of this Court is admitted.

We respectfully submit that this motion should be denied.

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